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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 309

ASA RAY FRENCH AND GLENDA BEATRICE
FRENCH,

Petitioners,

vs.

DONALD LINLEY FRENCH, A MINOR, BY MILDRED B.
FRENCH, HIS MOTHER AND NEXT FRIEND

PETITION FOR WRIT OF CERTIORARI TO THE
SUPREME COURT OF KANSAS AND BRIEF IN SUP-
PORT THEREOF.

✓
RUSSELL N. PICKETT,
HERBERT S. BROWN,
Counsel for Petitioners.

CARL VAN RIPER,
RUSSELL L. HAZZARD,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 309

ASA RAY FRENCH AND GLENDA BEATRICE
FRENCH,

vs.

Petitioners,

DONALD LINLEY FRENCH, A MINOR, BY MILDRED B.
FRENCH, HIS MOTHER AND NEXT FRIEND

PETITION FOR WRIT OF CERTIORARI

*To the Honorable Chief Justice and Associate Justices of
the Supreme Court of the United States:*

Your Petitioners, Asa Ray French and Glenda Beatrice French, respectfully show as grounds for the issuance of a Writ of Certiorari to the Supreme Court of Kansas:

A

Summary Statement of the Matter Involved

Petitioners are the named beneficiaries of a United States Government Life Insurance Policy issued to their son, Donald Ray French, deceased. This is a proceeding to

collect Five Thousand (\$5,000.00) Dollars of the proceeds of such policy from Petitioners as the result of an alleged oral agreement alleged to have been made by Petitioners to Respondent's mother to pay over to Respondent the sum of Five Thousand (\$5,000.00) Dollars out of the proceeds of said policy.

Petitioners are the father and mother of Donald Ray French, deceased U. S. Navy officer, and the paternal grandfather and grandmother of Respondent, and the former father-in-law and mother-in-law of Respondent's mother, Mildred B. French; Respondent is the son of Donald Ray French, deceased U. S. Navy officer.

Donald Ray French was killed in an automobile accident at Brunswick, Georgia, on March 31st, 1943, while still on active duty with the United States Navy. The United States Government then paid to Petitioners, as the named beneficiaries in the United States Government Life Insurance Policy which Donald Ray French had previously taken out on his life, the Ten Thousand (\$10,000.00) Dollars proceeds of such policy.

Respondent then brought this suit against Petitioners to have Petitioners pay over to him Five Thousand (\$5,000.00) Dollars of the proceeds of said policy.

The trial of this case was held in the District Court of Ford County, Kansas, on the 18th day of December, 1944. Respondent's mother was Respondent's only witness, and she testified to the matters above set forth. The Petitioners demurred to the evidence produced by Respondent, and stood upon such demurrer and did not produce any evidence in their behalf.

The District Court of Ford County, Kansas, rendered judgment for Respondent on the 22nd day of September, 1945, and Petitioners duly prosecuted their appeal to the Supreme Court of Kansas.

The Supreme Court of Kansas on the 6th day of April, 1946, affirmed the judgment of the District Court of Ford County, Kansas, on the ground that the oral agreement allegedly made by Petitioners was enforceable.

On the 24th day of April, 1946, Petitioners herein filed their motion for Rehearing setting forth the errors of the Supreme Court of Kansas and pointing out that such judgment and decision violated the provisions of the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a) (R. 52).

On the 10th day of May, 1946, the Supreme Court of Kansas, without further comment, overruled Petitioner's Motion for Rehearing.

Petitioners herein thereby completely exhausted all remedies available to them, save and except this Writ of Certiorari, and have proceeded to file this proceeding with this Court within the three months time limit provided for in pertinent Federal Law.

B

Basis of Jurisdiction

(1) The judgment of the Supreme Court of Kansas determined adversely to Petitioners the right, title, privilege, and immunity of Petitioners especially set up and claimed by Petitioners under the laws of the United States, in that it fails to give full faith and credit to the laws of the United States, as guaranteed Petitioners by the provisions of Section 1 of Article IV of the Constitution of the United States.

(2) The jurisdiction of this Court is urged under Section 237 of the Judicial Code, as last amended by an Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54

(U. S. C. A., Title 28, Section 344 and particularly Section 344 (b) thereof).

C

Questions Presented

Petitioner respectfully urges the following questions for the consideration of this Court:

1. Was not the Supreme Court of Kansas required to recognize the validity of the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a), under the full faith and credit clause of the Federal Constitution? (Section 1, Article IV, Constitution of the United States.)

2. Has not the Supreme Court of Kansas, by its decision in this case, entirely ignored the established law of the United States, deprived Petitioners of their property without due process of law, in violation of the V and XIV Amendments to the Constitution of United States.

D

Reasons Relied On for the Allowance of the Writ

(1) Section 237 of the Judicial Code, as last amended by an Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Section 344 (b)) provides:

"It shall be competent for the Supreme Court, by Certiorari, to require that there be certified to it for review and determination * * * any cause wherein a final judgment or decree has been rendered or passed by the highest court of a State in which a decision could be had where * * * any title, right, privilege or immunity is specially set up or claimed by either party under * * * any * * * statute of * * * the United States."

Section 1 of the XIV Amendment to the Federal Constitution provides:

“ * * * nor shall any State deprive any person of life, liberty or property without due process of law
* * * ”

Petitioners contend that the Supreme Court of Kansas was required to recognize the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a), and to render its decision in the instant case accordingly. The orderly administration of justice requires that when rights are clearly and unequivocally set out by legislation of the Congress of the United States, that such legislation be recognized and applied by all Courts.

(2) The Supreme Court of Kansas by its decision has decided a Federal question of substance not heretofore determined by the Supreme Court of the United States. Subsection 5 (a) of Rule 38, United States Supreme Court Rules.

(3) The importance of this case far transcends the interests of the parties to this suit. There have been several million United States Government Life Insurance policies issued to members of the armed forces of the United States during World War II. The rights of the holders of such policies and the beneficiaries named therein have been designated by pertinent Federal legislation. The decision in this case will set the pattern as to whether or not Federal legislation governing the rights of such policy holders and their beneficiaries will be followed. Only through the exercise by this Court of its discretion in the granting of this Writ can the established law of the United States, and the rights afforded by such law, be effected and preserved, not only

to these Petitioners, but to the many other million holders and the named beneficiaries of other United States Government Life Insurance Policies.

WHEREFORE, your Petitioners pray that a Writ of Certiorari be issued under the seal of this Court directed to the Supreme Court of Kansas, commanding said Court to certify and send to this Court a full and complete transcript of the record and proceedings in the case of Donald Linley French, a minor, by Mildred B. French, his mother and next friend, Plaintiff, *v.* Asa Ray French and Glenda Beatrice French, Defendants, Number 36,559, to the end that this cause may be reviewed and determined by this Court as provided for in the statutes of the United States, and that the findings and decision of said Supreme Court of Kansas to which Petitioners have objected be reversed by this Court, and for such further relief as to this Honorable Court may seem proper.

RUSSELL N. PICKETT,
HERBERT S. BROWN,
Counsel for Petitioners

RUSSELL L. HAZZARD,
CARL VAN RIPER,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

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ASA RAY FRENCH, AND GLENDA BEATRICE
FRENCH,

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DONALD LINLEY FRENCH, A MINOR, BY MILDRED B.
FRENCH, HIS MOTHER AND NEXT FRIEND

**BRIEF IN SUPPORT OF PETITION FOR WRIT OF
CERTIORARI**

I

Opinion of the Court Below

The opinion of the Supreme Court of Kansas in the case of Donald Linley French, a minor, by Mildred B. French, his mother and next friend, Respondent, *vs.* Asa Ray French and Glenda Beatrice French, Petitioners, is not yet reported in either the official or Pacific Reports. Such opinion may be found at pages 24 to 29, inclusive, of the Transcript filed with this Court.

II

Statement as to Jurisdiction

Petitioners, in support of the jurisdiction of the Court to review the above cause on Writ of Certiorari, respectfully states:

A

Statutory Provisions Sustaining Jurisdiction

Jurisdiction of the Court is based upon the Judicial Code, Section 237, as last amended by the Act of January 31, 1928, Chapter 14, Section 1, 45 Stat. 54 (U. S. C. A., Title 28, Section 344 and particularly Section 344 (b) thereof), which provides in part as follows:

“It shall be competent for the Supreme Court, by Certiorari, to require that there be certified to it for review and determination, with the same power and authority and with like effect as if brought up by Writ of Error, any cause wherein a final judgment has been rendered by the highest court of a state in which a decision could be had * * * where any title, right, privilege or immunity, is specially set up or claimed by either party under * * * any * * * statute of * * * the United States; * * *.”

B

Date of Decree of State Court

The judgment and decree sought to be reviewed was rendered on April 6, 1946, by the Supreme Court of Kansas. Petitioner's motion for rehearing was duly filed on April 24, 1946. On May 10, 1946, Petitioner's motion for Rehearing was denied. This case was decided by the Supreme Court of Kansas, *en banc*, and is a final judgment,

adverse to Petitioners, rendered by the highest court of Kansas.

Mower v. Fletcher, 114 U. S. 117, 29 L. Ed. 117, 5 Sup. Ct. Rep. 799;

Gorman v. Washington University, 316 U. S. 98, 86 L. Ed. 1300, 62 Sup. Ct. Rep. 962.

C

Nature of Case and Ruling Below

The instant case was instituted in the District Court of Ford County, Kansas. The object was to obtain a judgment requiring Petitioners, Asa Ray French and Glenda Beatrice French, to pay Respondent, Donald Linley French, the sum of Five Thousand (\$5,000.00) Dollars, it being contended by Respondent that Petitioners owed him this sum as the result of an oral promise of Petitioners to pay such sum out of the proceeds of the Government Life Insurance policy (R. 3 to 7).

Petitioners were the named beneficiaries of Respondent's father's United States Government Life Insurance policy, and Respondent contended that the oral promise on the part of Petitioners to pay over the said sum of Five Thousand (\$5,000.00) Dollars was made in order to conceal the fact of Respondent's father's marriage from U. S. Navy Authorities. At the time the alleged promise was allegedly made, Respondent was not in *esse*, but was an unborn child (R. 4).

Respondent's father, Donald Ray French, was killed on March 31, 1943, and the proceeds of his Government Life Insurance Policy was paid to Petitioners by the United States Government as the named beneficiaries in said policy (R. 6).

Petitioners filed an answer admitting all things in Respondent's petition alleged, except, Petitioners denied ever

having entered into an agreement with Respondent's mother to pay over to Respondent Five Thousand (\$5,000.00) Dollars out of the proceeds of the Government Life Insurance Policy, and also that any such agreement would be void and illegal (R. 7 to 9).

The issues were thus joined, and the trial of the case was held on the 18th day of December, 1944, before the Hon. Karl Miller, Judge of the District Court of Ford County, Kansas. Respondent's mother testified to the matters alleged in Respondent's petition, and Respondent rested his case. Petitioners then made a motion for Judgment on the Pleading and Evidence, which was overruled by the Court (R. 10). Petitioners then made an oral demurrer to Respondent's testimony and evidence for the reason that such testimony and evidence failed to show any right of recovery and failed to prove any cause on which to base a judgment, which demurrer was overruled by the Court (R. 10). The Petitioners then rested their case without the introduction of any evidence. The Court then discharged the jury hearing the case without submitting to it any questions or issues of fact, and made findings: "That the contract for the Respondent's benefit was entered into by the Petitioners as alleged in Respondent's petition and as a matter of law that the Petitioners were bound by said contract for the benefit of the Respondent, and that the Respondent was entitled to recover Five Thousand (\$5,000.00) Dollars from Petitioners" (R. 10).

Petitioners then filed a motion for a new trial on the 22nd day of September, 1945 (R. 11), which was overruled by the court on the 6th day of October, 1945 (R. 11), and judgment entered for Respondent in the sum of Five Thousand (\$5,000.00) Dollars (R. 11).

On the 19th day of November, 1945, Petitioners filed a notice of appeal on Respondent and his Attorneys to the Supreme Court of Kansas (R. 12).

The Supreme Court of Kansas rendered its decision in this case on the 6th day of April, 1946, and affirmed the judgment for the Respondent, holding that the contract for the benefit of Respondent was entered into by Petitioners, and that such contract was an enforceable one on the part of Respondent and affirmed the judgment of the District Court of Ford County, Kansas (R. 24 to 29).

On the 24th day of April, 1946, Petitioners filed a motion for rehearing in the Supreme Court of Kansas, asserting that the judgment of the trial court and the decision of the Supreme Court of Kansas sustaining it, violated and was contrary to the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a), which prohibits the assignment of the proceeds of Government Life Insurance policies (R. 30 to 32). Petitioners had made this contention in the trial court (See Certificate of Hon. Karl Miller, Judge, District Court, Ford County, Kansas, Addendum No. I appended hereto) and on appeal. However, the Supreme Court of Kansas did not refer to this Federal Statute (Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a)), or the Federal case (*Bradley v. United States*, 143 F. (2d) 573) cited by Petitioners in their arguments and briefs. Whether overlooked or intentionally disregarded by the Supreme Court of Kansas, Petitioners do not know.

Likewise, relative to Petitioners' motion for Rehearing, the Supreme Court of Kansas denied such motion without comment.

The Supreme Court of Kansas has by its decision in this case completely ignored the Federal Statute which governs the rights of Petitioners in this case.

D

Cases Believed to Sustain Jurisdiction

This Court has jurisdiction to review any decision wherein any title, right, privilege, or immunity is specially set up or claimed by either party under any statute of the United States, and wherein the protection of Section 1 of Article IV, and the XIV Amendment to the Constitution, are sought to preserve the rights of a litigant.

Sage v. Hampe, 35 Sup. Ct. Rep. 94, 235 U. S. 99, 59 L. Ed. 147;

Steele v. Louisville N. R. Co., 65 Sup. Ct. Rep. 226, 323 U. S. 192, 89 L. Ed. —;

Chicago, Burlington and Quincy Railroad Company v. City of Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581;

Raymond v. Chicago Union Traction Co., 207 U. S. 20, 52 L. Ed. 78, 28 Sup. Ct. Rep. 7;

Betts v. Brady, 316 U. S. 455, 86 L. Ed. 1595, 62 Sup. Ct. Rep. 1252;

Muhlker v. New York & Harlem Railroad Company, 197 U. S. 544, 49 L. Ed. 872, 25 Sup. Ct. Rep. 522.

III

Statement of the Case

In the interest of brevity, Petitioners do not here make a statement of the case, since a full statement has been given under heading "A" in the Petition for Writ of Certiorari and under heading II C in the Brief in Support of Petition for Writ of Certiorari.

IV

Specifications of Errors

1. The Supreme Court of Kansas erred in its decision and judgment by totally and patently failing to recognize the applicable statutes of the United States and decisions of the Federal Courts requiring a decision and judgment in Petitioner's favor so as to deprive Petitioners of their rights as specially granted them under the applicable United States Statute, viz: The Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a).

Summary of Argument

The failure of the Supreme Court of Kansas to recognize the Federal Statute (the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a), deprived Petitioners of rights and immunities granted them by said statute.

VI

Argument

A

The judgment of the trial court and the decision of the Supreme Court of Kansas sustaining such judgment violate, and are contrary to, the United States Statute relating to United States Government Life Insurance and assignment of the proceeds thereof, viz: Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of

the Act of October 17, 1940, 54 Stat. 1195 (U. S. C. A., Title 38, Section 454a), said statute being as follows, viz:

“Payments of benefits due or to become due shall not be assignable, and such payments made to, or on account of, a beneficiary under any of the laws relating to veterans shall be exempt from taxation, shall be exempt from the claims of creditors, and shall not be liable to attachment, levy, or seizure by or under any legal or equitable process whatever, either before or after receipt by the beneficiary. Such provisions shall not attach to claims of the United States arising under such laws nor shall the exemption herein contained as to taxation extend to any property purchased in part or wholly out of such payments.”

Congress by this statute states the policy of the Government relative to the rights of named beneficiaries to the proceeds of United States Government Life Insurance Policies. A State Court cannot regard or disregard the laws of the United States at its pleasure. *Sage v. Hampe*, 35 Sup. Ct. Rep. 94, 235 U. S. 99, 59 L. Ed. 147.

The State Courts are required to give to the statutes of the United States the same recognition, force and effect accorded the laws of the States. United States Constitution, Article IV, Section I.

The laws of the United States are part of the *lex fori* of a state. *Davis v. Corona Coal Company*, 265 U. S. 219, 44 Sup. Ct. Rep. 562, 68 L. Ed. 987.

In a similar case the Tenth Circuit Court of Appeals held in the case of *Bradley v. United States*, 143 F. (2d) 573, that where the Plaintiff (the mother of a deceased army officer) alleged an agreement between herself and the deceased's widow to compromise their respective claims to the proceeds of the deceased's United States Government Life Insurance on the basis of an equal division thereof, that such an agreement constitutes an assignment by the

designated beneficiary of payments of benefits due or to become due under a National Service Life Insurance Policy, and that such assignment is specifically prohibited by Section 3 of the Act of August 12, 1935, 49 Stat. 609, as amended by Section 5 of the Act of Oct. 17, 1940, 54 Stat. 1195, (U. S. C. A., Title 38, Section 454a). In the *Bradley* case, *supra*, the Court said at page 575:

“Clearly, the insured did not designate or intend to designate both his mother and wife as joint beneficiaries—one of them is the sole beneficiary to the exclusion of the other. *It follows therefore that an agreement to divide the proceeds of the policy constitutes an assignment by the designated beneficiary of payments of benefits due or to become due under a National Service Life Insurance policy, and that such assignment is specifically prohibited by Section 3 of the Act of August 12, 1935, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, 38 U. S. C. A. Section 454a. Robertson v. McSpadden, D. C., 46 F. 2d 702. The trial court did not err by its refusal to recognize or give effect to the agreement.*” (Italics supplied.)

The Federal Statute applies in the instant case as in the case of *Bradley v. United States, supra*. Petitioners respectfully assert that the decision of the Supreme Court of Kansas in this case shows a total disregard for the application of the established Federal statute (Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195; U. S. C. A., Title 38, Section 454a, to Petitioner's case. Respondent's alleged contract with Petitioners, even if actually entered into, which Petitioners deny, is void, invalid, and illegal in view of the controlling Federal statute *supra*. Petitioner's rights are violated by the action of the Supreme Court of Kansas in completely ignoring the Federal

Statute, and Petitioners respectfully submit they were and are clearly entitled to have the pertinent Federal Statute applied to their case.

Respectfully submitted,

RUSSELL N. PICKETT,
HERBERT S. BROWN,
Counsel for Petitioners.

RUSSELL L. HAZZARD,
CARL VAN RIPER,
Of Counsel.

ADDENDUM No. 1**IN THE DISTRICT COURT OF FORD COUNTY,
KANSAS**

DONALD LINLEY FRENCH, a Minor, by Mildred B. French,
His Mother and Next Friend, *Plaintiff*,

vs.

ASA RAY FRENCH and **GLENDA BEATRICE FRENCH**, *Defendants*

No. 14,943

Certificate

I, the undersigned, Karl Miller, Judge of the District Court of Ford County, Kansas, hereby certify that at the trial of the case of Donald Linley French, a Minor, by Mildred B. French, His Mother and Next Friend, *vs.* Asa Ray French and Glenda Beatrice French, in said District Court of Ford County, Kansas, being Case No. 14,943 on the docket of said court, Carl Van Riper appeared as attorney for defendants, Asa Ray French and Glenda Beatrice French, and then argued and urged that the alleged oral agreement between Asa Ray French and Glenda Beatrice French and their son, Donald Ray French, was void, illegal and of no effect because any such agreement would be in violation of the Federal Statute prohibiting the assignment of the proceeds of the United States Government Life Insurance, 38 United States Code Annotated, Section 454a, and then offered or cited in support thereof the decision of the United States Circuit Court of Appeals for the Tenth Circuit in the case of Bradley *vs.* United States *et al.*, 143 Federal (2nd) 573, and then furnished the undersigned with a copy of said decision.

In Witness Whereof, I have hereunto set my hand this 6th day of July, 1946.

(S.) KARL MILLER,
*Judge of the District Court
of Ford County, Kansas.*

Attest:

[SEAL.] (S.) ELTA J. RILEY,
[L.S.] *Clerk of Said Court.*

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SUPREME COURT OF THE UNITED STATES

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**ASA RAY FRENCH AND GLENDA BEATRICE
FRENCH,**

Petitioners,

vs.

**DONALD LINLEY FRENCH, A MINOR, BY MILDRED B.
FRENCH, HIS MOTHER AND NEXT FRIEND,**

Respondent.

PETITIONER'S REPLY BRIEF

✓
**RUSSELL N. PICKETT,
HERBERT S. BROWN,**
Counsel for Petitioners.

**CARL VAN RIPER,
RUSSELL L. HAZZARD,**
Of Counsel for Petitioners.

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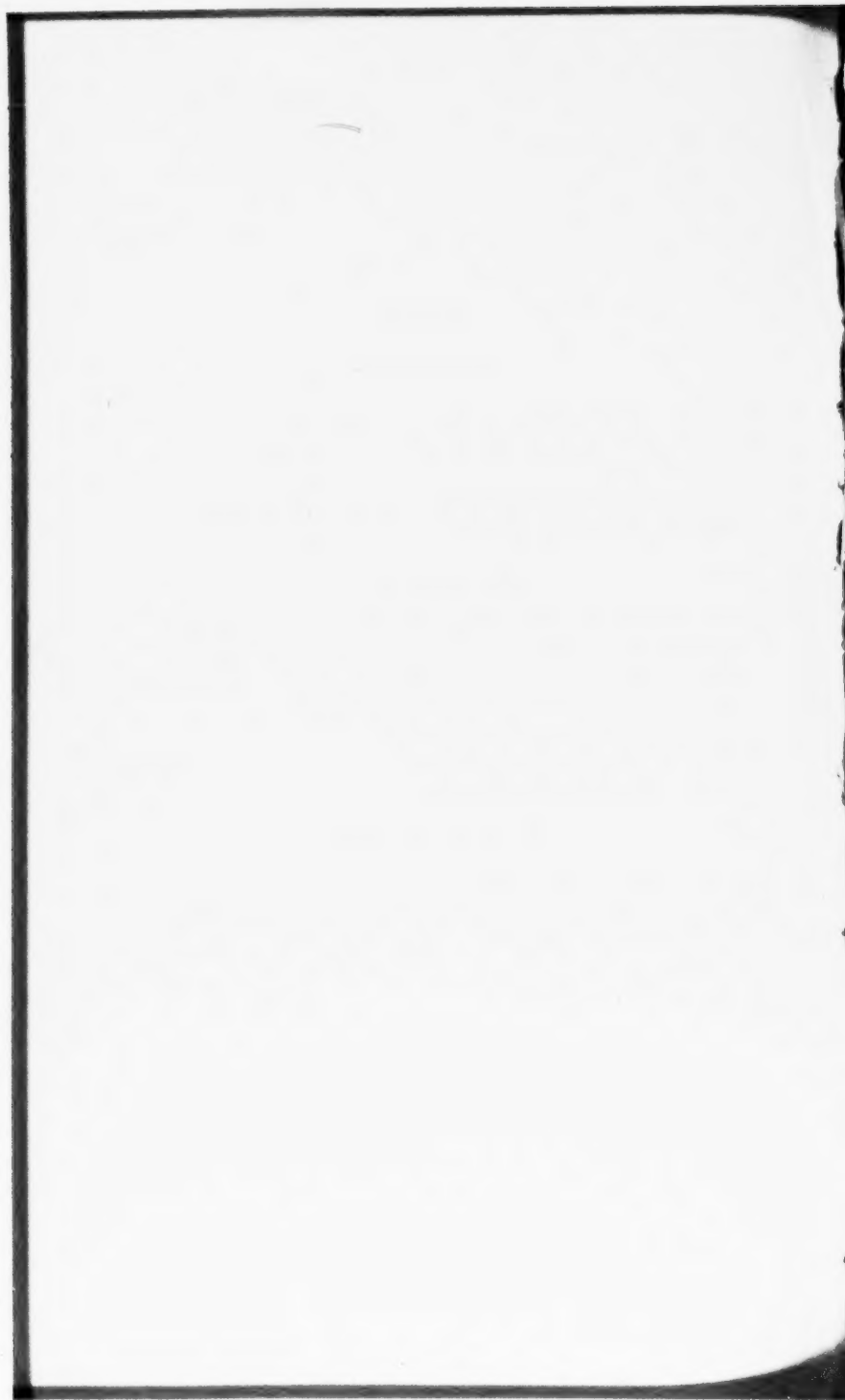
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SUPREME COURT OF THE UNITED STATES

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FRENCH,

vs.

Petitioners,

DONALD LINLEY FRENCH, A MINOR, BY MILDRED B.
FRENCH, HIS MOTHER AND NEXT FRIEND,

Respondent.

PETITIONER'S REPLY BRIEF

We will not burden this Court with an extended reply to Respondent's Brief in opposition to Petitioner's Application for Writ of Certiorari. We desire, however, to point out the following matters:

Respondent raises the questions (Respondent's brief 1, 6, 7,):

(1) Whether or not the record shows the issues raised by Petitioners were specially and specifically set up at the proper time and in the proper manner for decision by the Kansas Supreme Court.

(2) Were such issues necessary to that Court's decision,
and

(3) Were such issues actually determined thereby.

In this connection, we point out that the Certificate of the trial Judge shows that this issue was raised at the trial of this case. Further, the briefs filed in the court below of both Petitioner and Respondent show that this issue was again raised before and at the time this case was before the Supreme Court of Kansas. The motion for Rehearing (R. 30 to 32) also raised such issue. Therefore, the issue as to the applicability of the pertinent Federal Statute (the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a) was raised by these Petitioners at the outset of these proceedings, on appeal, and on motion for rehearing.

Counsel for Respondent assert (Respondent's brief, P. 8) that the certificate of the trial judge can avail Petitioners nothing, and cite the case of *Honeyman v. Hanan*, 300 U. S. 14, 81 L. Ed. 476, 57 Sup. Ct. Rep. 350, 1937, appeal dismissed 302 U. S. 375, 82 L. Ed. 312, in support thereof. A careful reading of the *Honeyman Case*, (*Supra*, 300 U. S. 1. c. 22) reveals that this Court had the following to say relative to such Certificates:

"Thus the true function of a certificate or statement of a state court, by way of amendment of, or addition to, the record, is to aid in the understanding of the record, to clarify it by defining the federal question with reasonable precision and by showing how the question was raised and decided, so that this Court upon the record *as thus clarified* may be able to see that the federal question was properly raised and was necessarily determined." (Italics supplied).

Petitioners in their answer to Respondent's petition, filed with the trial Court, alleged that any such agreement was void, illegal and of no effect. Petitioners were not required, under the laws of Kansas pertaining to civil procedure, to plead in their answer, the Federal Statute (the Act of

Insert—New Page 3

August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U.S.C.A., Title 38, Section 454a) prohibiting the assignment of the proceeds of United States Government Life Insurance. The General Statutes of Kansas, 1935, 60-750, provide: "Neither presumption of Law nor matters of which judicial notice is taken need be stated in the pleading." If the Petitioners had pleaded specifically that the agreement alleged by Respondent was void, illegal and of no effect because of the pertinent Federal Statute, and pleaded the Federal Statute verbatim, such pleading would merely have been a presumption of law on the part of Petitioners, and a matter of which the Supreme Court of Kansas must, in the absence of such pleading, take judicial notice of. The rule is correctly stated in 41 American Jurisprudence at page 294 as follows:

"It is a universally recognized rule that the courts of a state take judicial notice of its own public statutes or the general laws of Congress, and it is accordingly unnecessary to plead the public statutes of the state in which the action is brought, or, in an action in either a state or Federal court, to plead the laws of the United States, setting out either the contents or the substance thereof. When the existence or the contents of such laws are called in question, the court must necessarily decide the question the same as it decides any other question of law."

Therefore, Petitioners respectfully contend and show to the Court that they raised the Federal question in a proper manner, in that at the trial of this case, Petitioners stood on a demurrer to the evidence, and in support of their contention, argued that any such agreement was void, illegal and of no effect because prohibited by the pertinent Federal Statute, (the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U.S.C.A., Title 38, Section 454a). This was the proper manner in which to raise their

rights under this Federal Statute at the outset. Petitioners inquire of Counsel for Respondent by what other procedure could the Federal question be shown to the Trial Court?

Under such circumstances the Certificate of the Trial Court should properly be considered by this Court to determine if the Federal Statute was properly raised, and that Petitioner's rights under such Statute were therefore necessarily adversely determined to Petitioners.

In addition, this Federal question was raised on appeal by your Petitioners, as is shown by reference to our "Motion for Rehearing," under the caption "Argument" (R. 31) wherein your Petitioners *again* pointed out to the Supreme Court of Kansas that such Court did not refer to, in their decision, the pertinent Federal Statute or the case of *Bradley v. United States*, 143 Federal (2nd) 573, although these Petitioners had, in fact, devoted more than three pages in their brief on appeal to the Supreme Court of Kansas, to a discussion of the *Bradley* case, *supra*. Further, Respondents have in their Brief filed with the Supreme Court of Kansas, devoted more than a page to the discussion of the *Bradley* case, *supra*.

Petitioners cannot escape the belief, therefore, that Counsel for Respondent does not seriously contend the point made by them that the record here fails to show that a Federal question was presented to the Court below. The multitude of cases cited by Counsel for Respondent cover instances wherein a Federal Question *was not raised* in the Court prior to the decision of such Court. However, the facts here do not justify the application of those cases. The record in this case *refutes* any possible contention by Counsel for Respondent that a Federal Question was not stated and raised in the Court below. The record is replete with evidence that the Federal Statute in question was raised in both the trial Court and later in the Supreme

Court of Kansas on appeal. When the brief of petitioners filed with the Supreme Court of Kansas, devotes three pages to a discussion of the *Bradley* case *supra*, and the brief of Respondent contains more than one page of a discussion of the *Bradley* case, how can respondent *now* contend that the Supreme Court of Kansas did not have before it for determination the Federal Question? We again call this Court's attention to the record in Petitioner's "Motion for Rehearing" filed with the Supreme Court of Kansas under the caption "Argument" (R. 31) wherein Petitioners *again* pointed out to the Supreme Court of Kansas that such Court did not refer to the pertinent Federal Statute or the *Bradley* case, *supra*, although both Respondent and Petitioners had covered the Federal Question in their Briefs submitted to the Supreme Court of Kansas.

Therefore, your Petitioners submit that the record shows the Federal question was urged by them in the trial Court, on appeal, and also in their Motion for Rehearing. Petitioners, therefore, urged and relied on the Federal Statute and the decision of the *Bradley* case, *supra*, throughout every proceeding in this case, and Petitioners submit that the certificate of the trial judge makes clear the fact, if it were otherwise doubtful, that rights under the Federal Statute (The Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a) were relied upon and passed upon in the Courts below. See *Rector v. City Deposit Bank Company*, 200 U. S. 405, 26 Supreme Court Reports 289, 50 L. Ed. 527, and cases cited.

In addition, the contention of the Respondent that the record shows no Federal question might also be disposed of by reason of the additional fact that the action was brought to recover the proceeds of the Insured's United States Gov-

ernment Life Insurance Policy and the Petition of Respondent repeatedly refers to United States Government Life Insurance, and that the proceeds of such insurance had been paid to Petitioners by the Government of the United States, which on its face, would be controlled by the laws of the United States and this itself, therefore, presents a Federal question of substance.

Passing on to the question of whether or not such an agreement as alleged by Respondent is an invalid assignment, prohibited by the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a, Petitioners submit that this Statute refers to assignments by the insured as well as to assignments by the named beneficiaries. Indeed, if the Congress of the United States had intended to make such a restriction, they would have so stated in such law.

Attention is invited to page 18 of Respondent's brief wherein counsel for Respondent states, "The insured may at any time, change the designation of the beneficiary so as to "assign" the "benefits" to any person of his choosing—".

The Court's attention is also invited to page 24 of Respondent's brief wherein Counsel for Respondent states, "As a matter of fact, the case at bar might, despite *Bradley v. United States, supra*, have been based quite properly upon the theory that the contract between the insured and Petitioners effected a change of beneficiaries under the policy."

On page 13 of Respondent's brief in the Supreme Court of Kansas, Counsel for Respondent stated, "The Appellee (Respondent) makes no claim that there has been a change of beneficiary. Appellants (Petitioners herein) in their brief cited the case of *Bradley v. United States*, but we say

that it is not a case in point, for it merely holds that the Veterans Administration, a governmental agency, which administers the National Service Life Insurance Act, will not pay the proceeds of insurance to anyone but the named beneficiary."

Just what Counsel for Respondent means to be claiming is, to say the least, not clear. They assert one thing in the Supreme Court of Kansas and in this Court assert the opposite. It is now the apparent position of Counsel for respondent, that the purported agreement alleged to have been made by and between Petitioners and the insured, results in a change in the beneficiary of the policy of insurance. This is manifest from an examination of pages 24 and 25 of Respondent's brief. Such position on the part of Counsel for Respondent results in a complete about-face from their former position taken in the Supreme Court of Kansas, where they made the contention that the *Bradley* case, *supra*, was inapplicable to a decision by that Court. There Counsel for Respondent stated, as heretofore pointed out, as follows, "The appellee makes no claim that there has been a change of beneficiary." We cannot escape from inquiring *just what do the gentlemen mean?* First they contend in the Supreme Court of Kansas that there has been no change of beneficiary, and now in this Court they say there has been a change of beneficiary. Either their position before the Supreme Court of Kansas was unsound, or their position now taken in this Court is unsound. They cannot be right in both instances.

Petitioners submit to this Court one issue to decide, which issue has been consistently urged by them throughout all the proceedings of this case, *i.e.*, the alleged agreement on the part of Petitioners to assign the proceeds, made prior to the death of the insured, cannot be enforced by Respondent, either before or after the receipt of the proceeds by the

named beneficiaries, Petitioners herein, for the reason that any such agreement is illegal, void and of no effect, because prohibited by the pertinent Federal Statute, the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat., 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a. If an oral Assignment of the proceeds would not have been recognized by the Veterans Administration, and such agency was required by law to pay the proceeds to the named beneficiaries, then such oral assignment is still invalid after the proceeds have been paid to the named beneficiaries. Therefore, Respondent has no right of action against such named beneficiaries after the proceeds have been paid to them. To allow the same to be done, is to let the Respondent do indirectly what he cannot do directly.

Petitioners submit that an assignment of proceeds, as distinguished from a change of beneficiary, is exactly what is prohibited by the Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609 as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a. Indeed, if the insured desired to *change the beneficiary*, he was required to follow the proper method required by Federal law to effect a change in beneficiary. The insured was specifically authorized, under the Federal law pertaining to the naming of beneficiaries of a United States Government Life Insurance policy, to designate his parents, Petitioners herein, as the beneficiaries of his insurance, 43 Stat. 624 as amended, 38 U. S. C. A., Section 511. The Insured had the right to change the beneficiary if, and only if, he complied with pertinent Federal law. The pertinent Federal law, 46 Stat. 1016, 38 U. S. C. A., Section 426, gives the Administrator of Veterans affairs, the right and duty to promulgate regulations as to how a change of beneficiaries shall be effected. A change of beneficiaries,

to be valid and effective, is subject to and must be done in accordance with such regulations, and any such change of beneficiary can only be to another beneficiary who is within the class of beneficiaries allowed by law, 43 Stat. 624 as amended, 38 U. S. C. A., 512. The pertinent regulation of the Administrator of Veterans affairs is as follows:

“Regulation 3060, Regulations and Procedure, Veterans Administration, Washington, D. C.” “Change of Beneficiary. The insured under United States Government Life Insurance shall have the right at any time, and from time to time and without the consent or knowledge of the beneficiary, to change the beneficiary. *A change of beneficiary must be made by written notice to the Veterans' Administration over the signature of the Insured and shall not be binding on the United States unless received and indorsed on the policy by the Veterans' Administration. A change of beneficiary must be forwarded to the Veterans' Administration by the insured or his agent and must be accompanied by the policy.* A change of beneficiary may be indorsed during the lifetime of the insured or after his death, and when so indorsed said change shall be effective as of the date the insured signed the written notice of change of beneficiary. The United States shall be protected in all payments made to the beneficiary last of record and before receipt of notice of a change of beneficiary, and no payments so made shall be paid again to the changed beneficiary. The insured may exercise any right or privilege given under the provisions of a United States Government Life Insurance policy without the consent of the beneficiary. An original designation of a beneficiary may be made by the last will and testament, but no change of beneficiary may be made by the last will and testament.” (Italics supplied)

Indeed, the Respondent was not even in the proper class of beneficiaries at the time the alleged assignment was made, as Respondent was still an unborn child, not *in esse*, and

therefore not even without the permitted class of beneficiaries designated by the appropriate Federal Statute, 38 U. S. C. A. Section 511, 43 Statute 624, as amended, therefore, the insured, Donald Ray French, could not have designated Respondent, an unborn child at the time the alleged promise or assignment was made, for, as he was unborn and not *in esse*, he was not within the permitted class of beneficiaries, and, even assuming that a trust or assignment was created by the alleged promise of Petitioners such promise would still have been void under the Federal Statute, 38 U. S. C. A. Section 511, limiting the persons who can be named beneficiaries. Petitioners heartily agree with page 19 of Respondent's brief, wherein they quote from American Law of Veterans (Kimborough and Glen, 1946) as follows:

“Trusts in Insurance Proceeds.—The National Service Life Insurance Act is silent with respect to the right of an insured to ingraft a trust upon the insurance proceeds. In the face of a similar omission in the War Risk Insurance Act the courts held that a trust created by the insured would be enforced—A trust thus created is revocable. *Affirmance of the right to establish a trust in insurance proceeds does not mean that an insured can go outside the permitted class of beneficiaries and establish a trust in their favor, since to do so would be an evasion of the statutory provisions limiting the class of persons entitled to receive insurance proceeds.*” (Section 522, p. 396)

Petitioners submit that an assignment, trust, or contract for the benefit of a third person, as is herein claimed by Respondent, if made in favor of an unborn child, not *in esse*, that such unborn child was not within the permitted class of beneficiaries, and that the judgment of the Supreme Court of Kansas enforces an assignment, a trust, or a contract for the benefit of third persons, when such assignee,

cestui que trust or third person was not within the permitted class of beneficiaries permitted by the statute, 38 U. S. C. A. Section 511, 43 Stat. 624, as amended, and that if the judgment of the Supreme Court of Kansas is allowed to stand, such judgment would be an evasion of the statutory provisions limiting the class of persons entitled to receive the proceeds.

Petitioners also call attention to the Court that the cases cited by Respondent, starting at the bottom of page 20 of Respondent's brief to the end thereof, are all cases arising long before the enactment of the pertinent Federal Statute (Act of August 12, 1935, Chapter 510, Section 3, 49 Stat. 609, as amended by Section 5 of the Act of October 17, 1940, 54 Stat. 1195, U. S. C. A., Title 38, Section 454a).

Indeed, such act was probably enacted to prevent outsiders from contravening the wishes of insured veterans by claiming oral assignments or trusts in the proceeds of Government Life Insurance, and therefore the Congress made the proceeds unassignable.

In conclusion, we submit that the instant case presents Federal Questions of substance and of National importance which have not yet been decided by this Court. Petitioners throughout the entire proceedings of this case have contended the purported assignment to be in violation of Federal Statute. The question was raised in the Trial Court, in the Supreme Court of Kansas on appeal and on motion for Rehearing and was by such Court determined adversely to these Petitioners. The approximately fifteen million veterans of these United States who have taken out and now carry either United States Government or National Service Life Insurance are entitled to a pronouncement by this Court on such vital issues which affect their rights, and the rights of their named beneficiaries. We respectfully

urge that under such circumstances it is the plain duty of this Court to grant the Writ, so that these petitioners and others in like circumstances who may be adversely affected by alleged oral assignments of the proceeds of such insurance, may know of the protection afforded them by the Federal Statute which prohibit assignments of the proceeds of either United States Government or National Service Life Insurance.

Respectfully submitted,

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FILE COPY

IN THE
Supreme Court of the United States

OCTOBER TERM, 1948

No. 309.

ASA RAY FRENCH and GLENDA BEATRICE FRENCH,
Petitioners,

vs.

DONALD LINDLEY FRENCH, a Minor, by Mildred B. French,
his Mother and Next Friend, *Respondent.*

BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.

✓ ROBERT C. FOULSTON,
JOHN F. EBERHARDT,
Both of Wichita, Kansas,
Counsel for Respondent.

LANE A. DUTTON,
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Both of Dodge City, Kansas,
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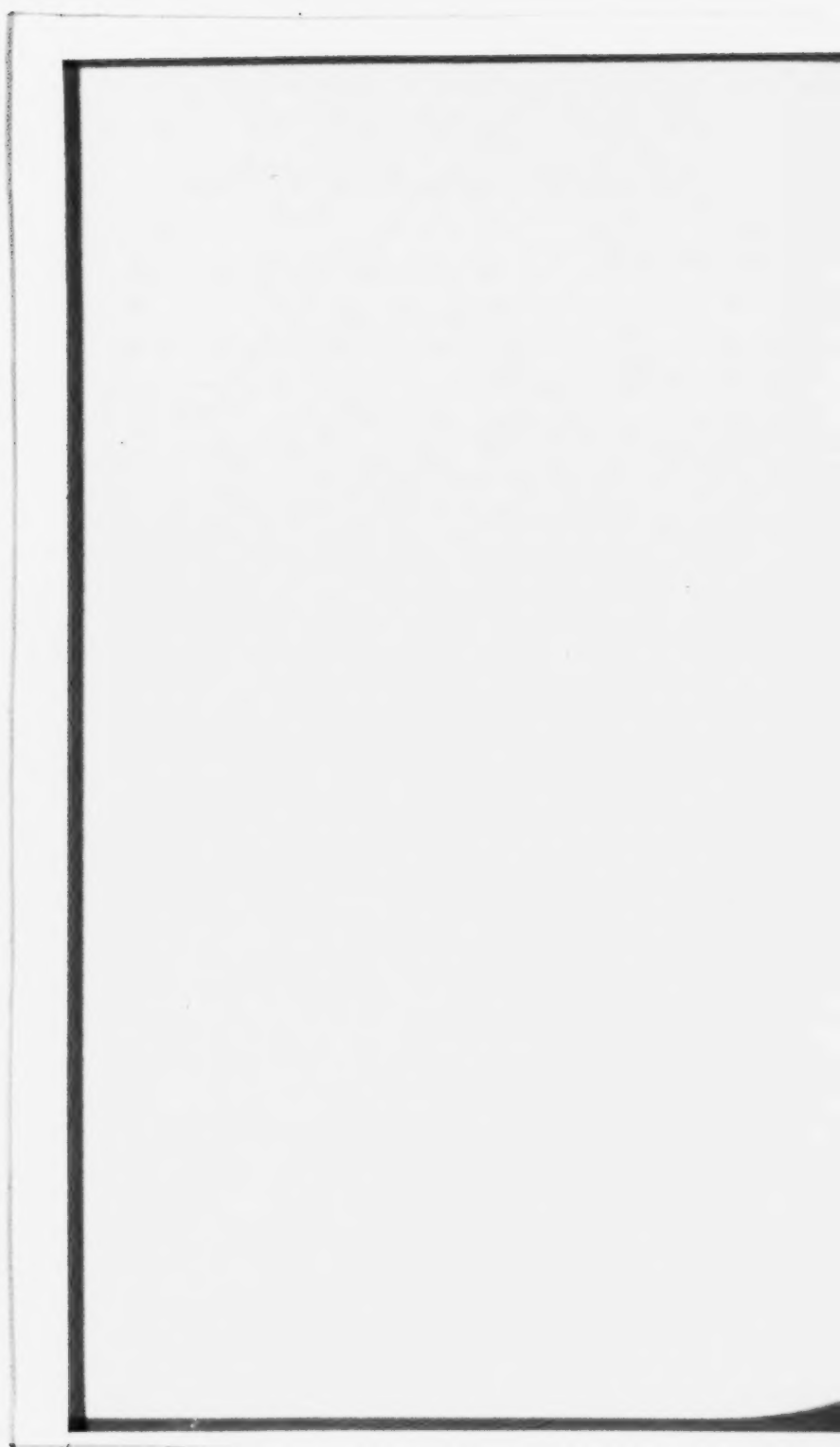
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IN THE
Supreme Court of the United States

OCTOBER TERM, 1946

No. 309.

ASA RAY FRENCH and GLENDA BEATRICE FRENCH,
Petitioners,

vs.

DONALD LINDLEY FRENCH, a Minor, by Mildred B. French,
his Mother and Next Friend, *Respondent.*

**BRIEF OF RESPONDENT IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

MAY IT PLEASE THE COURT:

Your Respondent, Donald Lindley French, a Minor, by Mildred B. French, his mother and next friend, in opposition to the petition for writ of certiorari and supporting brief, respectfully shows to this Honorable Court:

A.

OPINIONS BELOW.

Only opinion of the District Court of Ford County, Kansas, is that embodied in the Journal Entry of Judgment (R. b, 9). It is not reported.

Opinion of the Supreme Court of Kansas is reported in 161 Kan. (Adv. Sheet) 327, 167 P. (2d) 305, and appears at page 24 of the Record. The opinion denying motion for rehearing is not and won't be reported; it appears at page 33 of the record.

B.

JURISDICTIONAL STATEMENT.

(1) Jurisdiction of this Court is invoked under Section 237 of the Judicial Code as amended (28 U. S. C. A. § 344).

(2) Judgment of the Kansas Supreme Court was entered 6 April 1946 (R. 23, 24). Motion for rehearing (R. 30) was denied on 10 May 1946 (R. 33). Petition for writ of certiorari was filed 18 July 1946.

(3) No issue as to validity of the subject contract under Act of 12 August 1935, Chapter 410, § 3, as amended (38 U.S.C.A. § 454a), was specially set up or claimed in Petitioners' pleadings in the trial court (Answer, R. 7-9; Motion for New Trial, R. 11). The trial court's judgment does not indicate this issue was determined (R. b-d, 9-11). It was not designated in the notice of appeal (R. a, 12) or specification of errors (R. 19) to the Kansas Supreme Court, nor was it determined by that court (R. 24-29). The contention that the contract violated said statute was first raised on motion for rehearing (R. 30-31), which motion was denied without opinion (R. 33). That the judgment below was violative of the "full faith and credit" clause (Article IV, Section 1, United States Constitution) and of the "due process" clauses (Amendments V and XIV, United States Constitution) was urged for the first time in the instant petition for writ of certiorari.

C.

STATEMENT OF THE CASE.

This was an action to recover \$5,000, being one half the proceeds of U. S. Government Life Insurance (R. 7). Respondent, plaintiff below, is the insured's son (R. 3). Petitioners, defendants below, are the insured's parents (R. 5).

Respondent's petition alleged his father, a U. S. N. R. Ensign (R. 5), purchased a \$10,000 U. S. Government Life Insurance policy on 29 April 1940 (R. 5), naming Petitioners beneficiaries (R. 5). Before making application for the policy the insured told his parents, the Petitioners, he planned to procure such policy and designate Petitioners as beneficiaries, but that, should he die, he wanted Petitioners to pay half the policy proceeds to Respondent and the other half to Respondent's mother (R. 4-5). Petitioners agreed (R. 5). The insured died in 1943 (R. 6). Petitioners received the policy proceeds (R. 6), \$5,000 of which they held "as trustee for" Respondent (R. 6). Despite proper demand, Petitioners refused to carry out the agreement (R. 6-7).

Petitioners' answer admitted all allegations of the petition (R. 7-9), except it denied the agreement (R. 8) and alleged such an agreement would be "void and illegal" (R. 9).

At the trial, Respondent introduced evidence to establish the agreement (R. 10, 16-17). Petitioners moved for judgment on the evidence and pleadings (R. 10, 15), which motion was overruled (R. 10, 15). Petitioners then demurred to the evidence as failing "to show any right of recovery" or "to prove any cause on which to base a judgment" (R. 10, 14). The demurrer was overruled (R.

10, 15). Petitioners elected to stand on their demurrer (R. 10, 15). The trial court then discharged the jury (R. 10, 15), found generally for Respondent (R. 10), and specifically found Petitioners were bound by the agreement (R. 10, 15.) Judgment was entered accordingly (R. 10, 11).

Petitioners filed motion for new trial on the ground of "erroneous rulings" and that the judgment was "contrary to" and "not supported by" the evidence and was "contrary to law" (R. 11). The motion was overruled (R. 11).

Appeal was taken to the Kansas Supreme Court (R. 12). Petitioners' specification of errors (R. 12) was couched in vague generalities. It did not cite or suggest violation of the Act of 12 August 1935, Chapter 410, § 3 (38 U. S. C. A. § 454a) or any provision of the United States Constitution (R. 12).

In their brief to the Kansas Supreme Court, Petitioners specified only three "Questions Involved" (Brief of Appellant, p. 2):

"1. Was there a contract made between Donald Ray French, the insured, and his father and mother, Asa Ray French and Glenda Beatrice French, the beneficiaries, upon which the plaintiff is entitled to recover the proceeds of the insurance?"

"2. When the appellants collected the proceeds of the insurance policy, did they become trustees of a constructive and/or resulting trust (as claimed by plaintiff) or any other sort of trust, for the benefit of the appellee?"

"3. Was there a change of beneficiaries in the insurance policy, which would make the plaintiff the beneficiary (equitable or actual) and entitle him to the proceeds of the insurance?"

The only argument presented in their brief, in support of their first "Question Involved", was that the contract was void for lack of mutuality (cf. R. 28-29) and consideration (cf. R. 28). For their second proposition, Petitioners relied upon revocability and absence of a trust res, under an earlier Kansas Supreme Court decision (cf. R. 29). With reference to the third issue, Petitioners cited *Bradley v. United States, et al.*, 143 F. (2d) 537 (C. C. A. 10, 1944) as establishing the insured had not effected a change of beneficiary. Petitioners did *not* quote from or discuss the one portion of the Bradley opinion wherein validity of an agreement as to insurance proceeds was considered, did not cite or refer to 38 U. S. C. A. § 454a; and the Kansas Supreme Court, having determined the other two questions adversely (R. 25-29), was not required to and did not pass upon Petitioners' third contention (R. 25-29).

Petitioners submitted the case to the Kansas Supreme Court upon their brief, without oral argument (R. 23, 25), and that court did not pass upon the federal issues raised by the instant petition for writ of certiorari (R. 24-29).

Petitioners then filed a motion for rehearing wherein they urged, for the first time (cf. implied admission in paragraph 1 of said motion—R. 30), that the judgment violated 38 U.S.C.A. § 454a (R. 30-32). Even in that motion no contention was made that any provision of the United States Constitution was involved (R. 30-32). The motion was denied without opinion (R. 33). Whereupon Petitioners filed the subject petition for writ of certiorari.

D.

QUESTIONS PRESENTED.

Although largely confined to the questions posed by Petitioners (Petition, pp. 4, 13), Respondent considers the following question necessarily involved:

Does the record herein affirmatively show the issues raised by Petitioners were specially and specifically set up, at the proper time and in the proper manner, for decision by the Kansas Supreme Court, were necessary to that court's decision, and were actually determined thereby?

E.

SUMMARY OF ARGUMENT.

1. No issue as to validity of the instant agreement under 38 U. S. C. A. § 454a was presented to or passed upon by the Kansas Supreme Court. The record fails to show such issue was raised in the state trial court, nor was it specified in the notice of appeal, specification of errors, or statement of questions involved in Petitioners' brief to the Kansas Supreme Court. The Kansas Supreme Court did not pass upon the issue in its opinion. First raising the issue upon motion for rehearing was too late, at least when the Kansas Supreme Court denied the motion without opinion. The other, constitutional issues were never raised in the state courts at any time. Therefore, no jurisdiction exists to issue writ of certiorari.

2. The agreement in controversy is between *the insured* and the named beneficiaries, for the benefit of a third person. It is not a contract to "assign" the policy

"proceeds", but is more in the nature of a designation of new beneficiary, and the only statute applicable is 38 U. S. C. A. § 511. The authorities unanimously recognize and enforce such agreements, providing the third party beneficiary or cestui que trust is within the allowable class of beneficiaries of government insurance under 38 U. S. C. A. § 511. Petitioners' reliance is upon decisions dealing with agreements between named beneficiaries and third persons, *to which the insured is not a party*, and which, therefore, constitute agreements to assign the policy proceeds in violation of 38 U. S. C. A. § 454a. The distinction is obvious and well recognized, and no substantial federal question is posed by the case at bar.

F.

ARGUMENT AND AUTHORITIES.

I.

Upon the Record Herein, Petitioners Have Failed to Establish Jurisdiction of This Court to Issue a Writ of Certiorari.

The burden is upon Petitioners to show jurisdiction of this Court to issue the writ of certiorari (*Gorman v. Washington University*, 316 U. S. 98, 86 L. ed. 1300, 1942; rehearing den. 316 U. S. 711, 86 L. ed. 1777). This they have failed to do.

A. *The issues raised by Petitioners were neither properly nor timely presented in the State courts, and were not passed upon by the Kansas Supreme Court.*

Upon appeal from a decision of a lower, district court, the Supreme Court of Kansas considers only issues which were urged in the trial court (*Coryell v. Hardy*, 146 Kan. 522, 524, 72 P. 2d 457, 1937; *State Bank of Stella v. Moritz*, 146 Kan. 23, 69 P. 2d 15, 1937; *Anderson v.*

Shannon, 146 Kan. 704, 73 P. 2d 5, 1937; *Stephenson v. Wilson*, 147 Kan. 261, 76 P. 2d 810, 1938; *Fisher v. Central Surety & Ins. Co.*, 149 Kan. 38, 86 P. 2d 583, 1939; see *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 1889). And such issues must have been fairly raised and clearly and specifically pointed out to the district court to be available on appeal (*Mystic Legion v. Brewer*, 75 Kan. 729, 733, 90 Pac. 247, 1907; *Emery v. Bennett*, 97 Kan. 490, 155 Pac. 1075, 1916; *Clark v. Linley Motor Co.*, 126 Kan. 419, 268 Pac. 860, 1928; *Merrick v. Missouri-K-T Rld. Co.*, 141 Kan. 591, 595, 42 P. 2d 950, 1935; *State v. Pyle*, 143 Kan. 722, 782, 57 P. 2d 93, 1936; *State Bank of Stella v. Moritz*, 146 Kan. 23, 69 P. 2d 15, 1937; *Todd v. Central Petroleum Co.*, 155 Kan. 249, 124 P. 2d 704, 1942).

The record in this case fails to show any issue was presented to the state district court with respect to 38 U.S.C. A. § 454a or any provision of the U. S. Constitution. Neither the answer (R. 7-9) nor the motion for new trial (R. 11) even suggests any such issue. The same statement applies to the Journal Entry (R. b-d, 9-11). The rather amazing certificate of the district court judge, appendix number 1 to the petition for writ of certiorari (p. 17), can avail Petitioners nothing. It is no part of the Record herein. Even a certificate from the Chief Justice of the state court of last resort that a federal issue was presented to and passed upon by that court cannot import into the record a federal question not otherwise appearing therein, its sole office being to make certain that which is otherwise ambiguous on the face of the record (*Honeyman v. Hanan*, 300 U. S. 14, 81 L. ed. 476, 1937; app. dismiss. 302 U. S. 375, 82 L. ed. 312; cases cited in 28 U.S.C.A. § 344, Note 256, p. 298 et seq.) In any

event, the district judge's certificate was no part of the record before the Kansas Supreme Court upon the appeal. Therefore, the Kansas Supreme Court had no reason to suspect these issues were presented to or passed upon by the trial court.

Furthermore, for jurisdictional purposes with respect to writs of certiorari, whether a particular issue was passed upon by the state trial court is immaterial unless the issue was also raised in and decided by the highest state appellate court (*Hiawassee River P. Co. v. Carolina-Tennessee P. Co.*, 252 U. S. 341, 64 L. ed. 601, 1920).

In this connection, only errors specified in the notice of appeal (R. a, 12) are reviewable by the Kansas Supreme Court (*Allen v. Pearce Dental Supply Co.*, 149 Kan. 549, 551, 88 P. 2d 1057, 1939). And irrespective of how broad such notice of appeal may be, the only issues open to an appellant in the Kansas Supreme Court are those specified in the abstract (*Davidson v. McKown*, 157 Kan. 217, 139 P. 2d 421, 1943; *Picou v. Kansas City Public Service Co.*, 156 Kan. 452, 455, 134 P. 2d 686, 1943; *Bilby v. City of Wichita*, 151 Kan. 981, 101 P. 2d 919, 1940; *Stockgrowers State Bank v. Clay*, 150 Kan. 93, 94-95, 90 P. 2d 1101; 1939). This is in accordance with Rule Number 5 of the revised (15 Sept. 1942) Rules of the Supreme Court of Kansas (G. S. Kan., 1935, 60-3826):

"The appellant's abstract shall include a specification of the errors complained of, separately set forth and numbered."

Petitioners' specification of errors (R. 19) does not refer to 38 U. S. C. A. § 454a or to any provision of the United States Constitution, nor does it fairly imply any of the federal issues relied upon in the instant petition for

writ of certiorari. Furthermore, general specifications that the trial court "erred" are nullities, it being the rule in Kansas that a litigant cannot, on appeal, rely upon any issue not clearly and unmistakably called to the Kansas Supreme Court's attention by the specification of errors (*Lambeth v. Bogart*, 155 Kan. 413, 415, 125 P. 2d 377, 1942; *Heniff v. Clausen*, 154 Kan. 717, 212 P. 2d 196, 1942; *Brewer v. Harris*, 147 Kan. 197, 75 P. 2d. 287, 1938; *Groomer v. Barnes*, 148 Kan. 482, 83 P. 2d 631, 1938; *Elbukan Oil Co. et al. v. Lamb*, 12 F. 2d 387, C. C. A. 8, 1926).

Again, Rule 6(3) (b) of the aforesaid Rules of the Kansas Supreme Court (G. S. Kan., 1935, 60-3826), requires that appellant's brief contain:

"A statement of the question involved, or separately numbered statements of the several questions involved, in very brief and very general terms, to enable the court to acquire immediate comprehension of the nature of the controversy."

Respondent's "Statement of the Case", *supra*, sets forth verbatim the questions formulated by Petitioners in their brief to the Kansas Supreme Court; they fail to raise the federal issues now under consideration. Neither were these issues presented or discussed in Petitioners' brief to the Kansas Supreme Court. Hence even assuming, although denying, that Petitioners' specification of errors or statement of questions involved posed these issues, the Kansas Supreme Court could properly deem them abandoned and refuse to pass upon them (*Epperson v. Bennett*, 161 Kan. [Adv. Sheet] 298, 300, 167 P. 2d 606, 1946; *Henderson v. Deckert*, 160 Kan. [Adv. Sheet] 386, 162 P. 2d 88, 1945; *Sams v. Commercial Standard Ins. Co.*, 157 Kan. 278, 139 P. 2d 859, 1943; *Carrington v.*

British American Oil Producing Co., 157 Kan. 101, 138 P. 2d 463, 1943; *Tri-State Hotel Co. Inc. v. Southwestern Bell Telephone Co.*, 155 Kan. 358, 125 P. 2d 728, 1942; *In re Estate of Horton*, 154 Kan. 269, 276, 118 P. 2d 527, 1941; *Tawney v. Blankenship*, 150 Kan. 41, 90 P. 2d 1111, 1939; *Smith v. Kagey*, 146 Kan. 563, 570, 73 P. 2d 46, 1937).

Petitioners did finally raise the issue of whether the contract violated 38 U. S. C. A. § 454a by motion for rehearing (R. 30-31) filed after the Kansas Supreme Court had rendered its opinion (although even in that motion no contention was made that the judgment contravened any provision of the United States Constitution). But since the opinion in *Headley v. Challis*, 15 Kan. 453 (1875), written by Mr. Justice Brewer, it has been well settled in Kansas that:

“Where a case has once been submitted and decided, this court will not, as a rule, upon a motion for rehearing, consider any question not presented upon the original hearing.” (Syl. 1)

Among the many Kansas decisions to this effect are: *United Artists Corp. v. Mills*, 136 Kan. 33, 12 P. 2d 785 (1932); *Carlgren v. Saindon*, 130 Kan. 1, 284 Pac. 623 (1930); *Craig v. St. Louis-S. F. Rly. Co.*, 120 Kan. 427, 243 Pac. 1050 (1926); *Brown v. Oil Co.*, 114 Kan. 482, 218 Pac. 998 (1913); *Mollohan v. Patton*, 110 Kan. 667, 205 Pac. 643 (1922); *Blair v. McQuary*, 100 Kan. 206, 164 Pac. 262 (1917); *Beeler v. Sims*, 93 Kan. 213, 144 Pac. 237 (1914); *State v. Coulter*, 40 Kan. 673, 20 Pac. 525 (1889); and *Western News Co. v. Wilmarth*, 34 Kan. 254, 8 Pac. 104 (1885). Very properly, therefore, the Kansas Supreme Court denied the motion for rehearing without opinion (R. 33).

It is submitted no "federal issue" was timely or properly presented to or determined by the Kansas Supreme Court.

B. Failure of the Kansas Supreme Court to Pass Upon Any Federal Issue Is Fatal to This Courts' Certiorari Jurisdiction.

At the outset it is noted that Petitioners, in formulating "Questions Presented" per Rule 38, paragraph 2, of the Rules of this Court, attempt to predicate federal issues upon Section 1, Article IV ("full faith and credit" clause) and Amendments V and XIV ("due process" clauses) of the United States Constitution.

For several reasons these constitutional issues are unavailable to Petitioners. Such issues were never presented to or considered by the Kansas Supreme Court at any time, and no issue not asserted in and passed upon by the state supreme court is ground for certiorari (*McGoldrick v. Gulf Oil Corp.*, 309 U. S. 430, 84 L. ed. 849, 1940). Even assuming, *arguendo*, a proper federal issue as to 38 U. S. C. A. § 454a had been raised in the Kansas Supreme Court, this would not authorize Petitioners' reliance upon these additional constitutional issues (*Montana ex rel. Haire v. Rice*, 204 U. S. 291, 51 L. ed. 490, 1907; *Dewey v. Des Moines*, 173 U. S. 193, 43 L. ed. 665, 1899). Again, Rule 27, paragraph 2(3) of the Rules of this Court requires a specification in Petitioners' brief of the errors relied upon; paragraph 6 of Rule 27 provides all errors not so specified will be disregarded (and see *Flournby v. Weiner*, 321 U. S. 253, 259, 261, 263, 88 L. ed. 708, 1944; *Donnelley v. U. S.*, 276 U. S. 505, 511, 72 L. ed. 676, 1927; *New York ex rel. Rosevale Realty Co. v. Kleinert*, 268 U. S. 646, 651, 69 L. ed. 1135, 1925). Petitioners' specification of errors (Brief, p. 13) and "sum-

mary of argument" (Brief, p. 13) fail to assert the constitutional issues. Too, the "full faith and credit" clause (Section 1, Article IV) merely requires each state to recognize the statutes, records, and judicial proceedings "of every other *State*", and has no application to federal enactments. Likewise the "due process" clause of the Fifth Amendment applies only to the federal government (*Chapin v. Fye*, 179 U. S. 119, 45 L. ed. 119, 1900). In any event, the constitutional issues add nothing to Petitioners' "title, right, privilege or immunity" under 38 U. S. C. A. § 454a insofar as the appropriate jurisdictional statute (28 U. S. C. A. § 344 (b)) is concerned.

With reference to Petitioners' alleged rights under 38 U. S. C. A. § 454a, it is well established that, to vest this Court with certiorari jurisdiction, it must affirmatively appear from the record that the federal question (whether the subject contract is violative of said statute) was properly presented to the Kansas Supreme Court for decision, that its decision was necessary to a determination of the cause, and that it was actually decided by the Kansas court (*Congress of Industrial Organizations v. McAdory*, 325 U. S. 472, 89 L. ed. 1741, 1945; *Charleston Fed. Sav. & L. Asso. v. Alderson*, 324 U. S. 182, 89 L. ed. 857, 1945; *McGoldrick v. Gulf Oil Corp.*, 309 U. S. 430, 84 L. ed. 849, 1940; *Southwestern Bell Telegraph Co. v. Oklahoma*, 303 U. S. 206, 82 L. ed. 751, 1945; *Honeman v. Hanan*, 300 U. S. 14, 81 L. ed. 476, 1937, appeal dismissed, 302 U. S. 375, 82 L. ed. 312; *White River Lumber Co. v. Arkansas ex rel. Applegate*, 279 U. S. 692, 73 L. ed. 903, 1929; *Mellon v. O'Neil*, 275 U. S. 212, 72 L. ed. 245, 1927; *Whitney v. California*, 274 U. S. 357, 71 L. ed. 1095, 1926; *New York ex rel. Rosevale Realty Co. v. Kleinert*, 268 U. S. 646, 69 L. ed. 1135, 1925; *El Paso &*

S. W. R. Co. v. Eichel & Weikel, 226 U. S. 590, 57 L. ed. 369, 1913; *Cincinnati N. O. & T. P. R. Co. v. Slade*, 216 U. S. 78, 54, 54 L. ed. 390, 1910; cases cited in 28 U. S. C. A. § 344, Note 49, p. 231 et seq.).

The statute (28 U. S. C. A. § 344 (b)) requires that the federal issue be "specially set up or claimed" in cases such as this (where the validity of a statute or treaty is not involved), and this necessitates a showing that the federal issue was specifically and pointedly called to the Kansas Supreme Court's attention and not obscured by generalities (*Congress of Industrial Organizations v. McAdory*, *supra*, 325 U. S. 472, 89 L. ed. 1741; *Charleston Fed. Sav. & L. Asso. v. Alderson*, *supra*, 324 U. S. 182, 89 L. ed. 857; *Herndon v. Georgia*, 295 U. S. 441, 79 L. ed. 1430, 1935, reh. den. 296 U. S. 661, 80 L. ed. 471; *New York ex rel. Rosevale Realty Co. v. Kleinert*, *supra*, 268 U. S. 646, 69 L. ed. 1135; *El Paso & S. W. R. Co. v. Eichel & Weikel*, *supra*, 226 U. S. 590; 57 L. ed. 369; *Thomas v. Iowa*, 209 U. S. 264, 52 L. ed. 782, 1908; *Harding v. Illinois*, 196 U. S. 78, 49 L. ed. 394; 1904; *Onondaga Nation v. Thacher*, 189 U. S. 306, 47 L. ed. 826, 1903; *Re Buchanan*, 158 U. S. 31, 39 L. ed. 844, 1895; see cases cited in 28 U. S. C. A. § 344, Note 221, p. 282, Note 228, p. 289, and Note 230, p. 291).

The federal issue must also have been presented to the Kansas Supreme Court timely and in a manner proper under the procedural rules of the State of Kansas (*Congress of Industrial Organizations v. McAdory*, *supra*, 325 U. S. 372, 89 L. ed. 1741; see cases cited in 28 U. S. C. A. § 344, Note 224, p. 284 Note 225, p. 285, Note 226, p. 286, and Note 227, p. 288). First raising the issue on motion for rehearing is too late (*Radio Station W. O. W., Inc. v. Johnson*, 326 U. S. 120, 89 L. ed. 2092, 1945;

Herndon v. Georgia, supra, 295 U. S. 441, 79 L. ed. 1530; *Bowe v. Scott*, 223 U. S. 658, 58 L. ed. 1141, 1914; *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 112, 53 L. ed. 431, 1909; *Corkran Oil & D. Co. v. Arnaudet*, 199 U. S. 182, 50 L. ed. 143, 1905; *McMillen v. Ferrum Mining Co.*, 197 U. S. 343, 49 L. ed. 784, 1905; *Mutual Life Ins. Co. of N. Y. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 1903; *Capital Nat. Bank of Lincoln v. First Nat. Bank of Cadiz*, 172 U. S. 425, 43 L. ed. 502, 1898; and see 28 U. S. C. A. § 344, Note 224, p. 284, and Note 227, p. 288.)

"Nothing is better settled than that it is too late to raise a federal question for the first time in a petition for rehearing, after the final judgment of the state court of last resort." (28 U. S. C. A. § 344, Note 227, p. 288.)

If the Kansas Supreme Court decision was based in part on a "non-federal" ground, sufficient in itself to support the judgment, certiorari cannot issue (*McCoy v. Shaw*, 277 U. S. 302, 72 L. ed. 891, 1928; 28 U. S. C. A. § 344, Note 50, p. 232). This rule is applied even when it is not clear whether the state decision was in the fact premised upon a non-federal basis, so long as the opinion could or might have been so based (*Williams v. Kaiser*, 323 U. S. 471, 89 L. ed. 498, 1945; *Flournoy v. Wiener*, 321 U. S. 253, 88 L. ed. 708, 1944; *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 79 L. ed. 191, 1934; *Cox v. Thomas*, 201 U. S. 446, 50 L. ed. 1099, 1906; *Chicago, I. & L. R. Co. v. McGuire*, 196 U. S. 128, 49 L. ed. 413, 1905; *Klinger v. Missouri*, 13 Wall. 257, 20 L. ed. 635, 1872). Thus, if, by Kansas law, the Kansas Supreme Court might have refused to determine the federal issue for any procedural reason—as, for example, failure to raise the issue in the trial court, failure properly to speci-

fy such error in the abstract or brief, or failure to present the issue before motion for rehearing—writ of certiorari cannot issue (*Penn. R. Co. v. Illinois Brick Co.*, 297 U. S. 447, 80 L. ed. 796, 1936; *Herndon v. Georgia*, *supra*, 295 U. S. 441, 79 L. ed. 1530; *Barbour v. Georgia*, 249 U. S. 454, 63 L. ed. 704, 1919; *Missouri, K & T. R. Co. v. Sealy*, 248 U. S. 363, 63 L. ed. 296, Kan., 1919; *Mo. Pac. R. Co. v. Taber*, 244 U. S. 200, 61 L. ed. 1082, 1917; *Louisville & N. R. Co. v. Woodford*, 234 U. S. 46, 58 L. ed. 1202, 1914; *Cox v. Thomas*, 201 U. S. 446, 50 L. ed. 1099, 1906; *Chicago, I. & L. R. Co. v. McGuire*, *supra*, 196 U. S. 128, 49 L. ed. 413; *Baldwin v. Kansas*, 129 U. S. 52, 32 L. ed. 640, 1889; see 28 U. S. C. A. § 344, Note 225, p. 285, Note 81, p. 251).

Finally, the record itself must affirmatively show these requirements have been satisfied and that the federal issue, upon which certiorari is sought, was actually raised in and determined by the Kansas Supreme Court: *Williams v. Kaiser*, 323 U. S. 471, 89 L. ed. 398 (1945); *Minnesota v. National Tea Co.*, 309 U. S. 551, 84 L. ed. 920 (1940); *Southwestern Bell Teleph. Co. v. Okla.*, *supra*, 303 U. S. 206, 82 L. ed. 751 (1938); *Lynch v. New York ex rel. Pierson*, 293 U. S. 52, 79 L. ed. 191 (1934); *Whitney v. California*, *supra*, 274 U. S. 357, 71 L. ed. 1095; see 28 U. S. C. A. § 344, Note 251, p. 294 et seq. It is customary to examine the opinion of the state court of last resort in determining what issues were passed on by that court (*Indiana ex rel. Anderson v. Brand*, 303 U. S. 95, 82 L. ed. 685, 1938, reh. den. 303 U. S. 667, 82 L. ed. 1123; *Thompson v. Maxwell Land Grand & R. Co.*, 168 U. S. 451, 42 L. ed. 539, 1897), and if, as in a denial of motion for rehearing, no opinion is filed by the state court, writ of certiorari cannot issue (*Cuyahoga River Power*

Co. v. Northern Realty Co., 244 U. S. 300, 61 L. ed. 1153, 1917; *Waters-Pierce Oil Co. v. Texas*, *supra*, 212 U. S. 112, 53 L. ed. 431; *Corkran Oil & Do. Co. v. Arnaudet*, *supra*, 199 U. S. 182, 50 L. ed. 143; *Mut. Life Ins. Co. of N. Y. v. McGrew*, 188 U. S. 291, 47 L. ed. 480, 1903).

Tested by these principles, no jurisdiction to issue a writ of certiorari exists in the case at bar. No federal issue was raised by Petitioners' answer (R. 7) or motion for new trial (R. 11), and none was determined by the state district court (R. b, 9). No such issue was "specially set up or claimed" in the notice of appeal (R. 12), specification of errors (R. 19), "questions presented" in Petitioners' brief, or in the actual brief itself to the Kansas Supreme Court; and undeniably it was never "clearly and unmistakably" presented to that court. The record (R. 24-29) fails to disclose, affirmatively or by negative implication, that any federal issue was ever raised in or determined by the Kansas Supreme Court prior to the motion for rehearing (R. 30), which motion was denied without opinion (R. 33). Substantial non-federal grounds support the court's decision inasmuch as the federal issue was not properly, timely, or clearly raised. It is submitted, therefore, that the petition herein should be denied.

II.

The Judgment of the Kansas Supreme Court Does Not Contravene 38 U. S. C. A. § 454a or Any Constitutional Provision.

Inasmuch as each of the questions presented and urged by Petitioners (Petition, p. 4, 13) comes merely to the contention that the agreement, upheld by the Kansas Supreme Court decree, is void under 38 U. S. C. A. § 454a, we confine ourselves to that proposition.

Assuming, although denying, that the Kansas Supreme Court was required to and did pass upon this issue in reaching its decision in the case at bar, it is submitted such judgment would involve no novel holding, would be fully in accord with a considerable body of unanimous precedent, and would not be in contravention of 38 U. S. C. A. § 454a.

In their argument Petitioners entirely misconceive the nature and effect of the agreement which they erroneously contend is violative of the statutory mandate that:

"Payments of benefits due or to become due shall not be assignable . . ." (38 U. S. C. A. § 454a)

This provision obviously refers to agreements between beneficiaries *and third persons* to assign insurance proceeds. There could be no conceivable justification for construing the quoted phraseology as applicable to the *insured* himself. The insured may, at any time, change the designation of beneficiary so as to "assign" the "benefits" to any person of his choosing, so long as he selects a beneficiary within the authorized class, and any agreement purporting to foreclose this right is void (*Von Der Lippi-Lipski v. U. S.*, 4 F. 2d 168, App. D. C., 1925; *Lewis v. U. S.*, 56 F. 2d 563, C. C. A. 3, 1932; see *United States v. Williams*, 302 U. S. 45, 82 L. ed. 39, 1937). It would be a peculiar distortion of the old adage to hold the insured were prohibited from doing indirectly that which he is authorized to do directly.

Respondent and his mother were both within the class of beneficiaries designated by the statute (38 U. S. C. A. § 511, 43 Stat. 624, as amended). The insured might have named them beneficiaries in the first instance. He might at any time have changed the designation of bene-

ficiaries from Petitioners to Respondent and his mother. Obviously, then—and the authorities unanimously so hold—the *insured* might contract with Petitioners that they pay the proceeds to Respondent. Such an agreement is tantamount to and is tested by the beneficiary designation provisions (38 U. S. C. A. § 511), rather than by the “assignment of proceeds” limitations (38 U. S. C. A. § 454a) of the statute. Petitioners’ failure to appreciate the distinction between a contract to which the insured is a party and one between the designated beneficiaries and third persons (not including the insured) is indicated by their reference to the instant contract as one between Petitioners’ and Respondent’s *mother* (Petition for Writ of Certiorari, lines 3, 4, page 2).

The distinction Respondent is urging appears clearly from the following summary of the appropriate law in *American Law of Veterans* (Kimborough & Glen, 1946):

“Trusts in Insurance Proceeds.—The National Service Life Insurance Act is silent with respect to the right of an *insured* to ingraft a trust upon the insurance proceeds. In the face of a similar omission in the War Risk Insurance Act the courts held that a trust *created by the insured* would be enforced . . . A trust thus created is revocable. Affirmance of the right to establish a trust in insurance proceeds does not mean that an insured can go outside the permitted class of beneficiaries and establish a trust in their favor, since to do so would be an evasion of the statutory provisions limiting the class of persons entitled to receive insurance proceeds.” (§ 522, p. 396; emphasis ours)

At the same time, and in the same paragraph, the authors recognize that a similar trust or agreement between the named beneficiary and others, *to which the in-*

insured was not a party, might be invalid as an assignment of proceeds:

"Whether an agreement *between a beneficiary and others* to share the proceeds of insurance with them would be enforceable as a trust, in view of the statutory provisions against assignment of insurance proceeds, may be open to doubt." (§ 522, p. 397; emphasis supplied)

Petitioners rely herein upon *Bradley v. United States*, 143 F. (2d) 537 (C. C. A. 10, 1944). There the insured's policy named his mother as beneficiary. Later he expressed a wish that his wife be so designated, but he neither notified his mother to such effect nor entered into any such agreement with her. After his death a fight ensued over the proceeds. In the main, the decision deals solely with the question of whether the insured had effected a valid change of beneficiary. However, the mother alleged an agreement, made after the insured's death, *between the mother and the wife*, to share the proceeds equally, and it is this agreement which the court held violative of the non-assignment provision of 38 U. S. C. A. § 454a. To the same effect is *Robertson v. McSpadden et al.*, 46 F. (2d) 702 (E. D. Ark., 1931), and *American Law of Veterans*, *supra*, § 523, p. 397.

These authorities, however, are wholly out of point where, as here, the trust or agreement was entered into between the *insured* and the designated beneficiary.

Thus, in *Ambrose v. U. S.*, 15 F. (2d) 52 (W. D. New York, 1926), a soldier took out War Risk Insurance naming his sister as beneficiary. Before doing so, however, by letter and orally he instructed his sister he was designating her with the understanding she should share the policy proceeds with his other sisters and brother. After

the soldier's death, it was held this amounted to a change of beneficiary, enforceable as such. Alternatively, the court likewise held:

"Plaintiffs also seek recovery herein on the theory that the designated beneficiary became a trustee for the combined benefit of plaintiffs and herself. The proofs . . . establish this claim. The parol agreement between her and the insured that she would divide the installments was valid, and was sufficiently broad to impress a trust upon her which a court of equity may enforce."

Similarly, in *Christensen v. Christensen*, 14 F. (2d) 475 (S. D. New York, 1926), two brother-soldiers each took out War Risk Insurance, each policy naming a third brother, Carlo, as beneficiary. The two brothers, however, entered into an agreement with Carlo that upon the death of either brother Carlo should share his insurance proceeds with the surviving brother. In a suit by the surviving brother to recover the policy proceeds from Carlo, it was held:

"It is true that an assignment of the rights to war veterans' insurance would be invalid. However, complainant comes within the permitted class under section 300 (Comp. St. § 9127½-300) which provides that 'the insurance shall be payable to a spouse, child, grandchild, parent, brother, sister, uncle,' etc."

"An oral trust is alleged to have been created at the time of taking out the insurance. This was valid under general principles of law [citations], and there is nothing in the statute which forbids it in relation to the particular insurance here involved. It amounted to the designation of the complainant as a contingent beneficiary at the time the insurance was taken out. The defendant Carlo Christensen had nothing differing from a passive or dry trust in one-half of the

insurance. His duty was but to receive and pay over the insurance moneys."

In *Wolcott v. Wolcott*, 17 Ohio App. 48 (1920), where a soldier, contemporaneously with applying for War Risk Insurance, wrote his father that he was designating him beneficiary but instructed the father to hold the proceeds for other persons within the permitted class of beneficiaries, it was held a valid and enforceable trust was created.

Lashley v. Lashley, 212 Ala. 229, 102 So. 229 (1924), enforced a similar contract. A soldier purchased War Risk Insurance designating his brother as beneficiary. He and his brother orally agreed the brother should share the proceeds equally with the insured's other brothers and sisters. In upholding this contract after the insured's death, the court wrote (102 So. at 230) :

"We find nothing in the federal statutes or the policy which forbids this trust or the enforcement of same in the courts of this state. The creation of the trust was contingent and did not impair the right of the insured to redesignate or change the beneficiary at any time before his death."

Following *Ambrose v. U. S.*, *supra*, 15 F. (2d) 52, an agreement between a soldier, the insured under a War Risk Insurance Policy, and his brother, the designated beneficiary, that the latter should share the proceeds equally with the insured's other brothers and sisters, was held, after the insured's death, to constitute a valid and enforceable contract in favor of the other brothers and sisters: *Kaschefskey v. Kaschefskey*, 110 F. (2d) 836 (C. C. A. 6, 1940).

Compare, also, *Duncan v. Linton, et al.*, 38 Ohio App. 57, 175 N. E. 621 (1929), *pet. in error dismissed*, 121 Oh. St. 615, 172 N. E. 377. And see *Staples v. Murray*, 124 Kan. 730, 262 Pac. 588 (1928), which does not consider such an agreement void under 38 U. S. C. A. § 454a (although holding the contract unenforceable for other reasons, to which extent the case is expressly overruled by the instant opinion—R. 29). And see *Elliott v. U. S.*, 271 Fed. 1001 (N. D. Ohio, 1920), where a trust, under circumstances comparable to those here existing, was denied not because of invalidity but because the evidence failed to establish any agreement or understanding between the insured and the beneficiary.

The only decisions refusing to enforce contracts of this nature, entered into between the *insured* and the beneficiary, are those in which the insured attempted to create rights in favor of third persons outside the class of permitted beneficiaries; yet these decisions do not deny the insured's right to so contract with the designated beneficiary for the benefit of third persons *within* the allowable beneficiary class: *Jones v. U. S. et al.*, 61 F. Supp. 406 (D. Mass., 1945, and *Vincent v. Kelly, et al.*, 195 N. Y. S. 57, 118 Misc. Rep. 591 (1922).

One case which involves both an agreement between the insured and the named beneficiary (such as the contract now in controversy), and also an agreement between the named beneficiary and third persons, to which agreement the insured was not a party (the type of contract condemned in *Bradley v. United States, supra*), is of interest here. In *Calhoun v. Ussery*, 46 F. (2d) 495 (W. D. La., 1930), a soldier named his sister beneficiary under a War Risk Insurance. Later he wrote her instructions to share the proceeds with his other two sisters. There-

after he married and died, leaving two infant children surviving. The named beneficiary and her two sisters shared the policy proceeds in accordance with the contract with the insured, and the validity of this agreement is not questioned by the decision. However, thereafter, because the infant children were in necessitous circumstances, the three sisters agreed among themselves to turn over the unpaid installments, when received, to the children. The latter trust was held unenforceable, although the grounds stated in the opinion throw little light on the case at bar.

As a matter of fact the case at bar might, despite *Bradley v. United States*, *supra*, have been based quite properly upon the theory that the agreement between the insured and Petitioners effected a change of beneficiaries under the policy: *Kaschefskey v. Kaschefskey*, *supra*, 110 F. (2d) 836; *Duncan v. Linton, et al.*, *supra*, 38 Ohio App. 57, 175 N. E. 621; *Ambrose v. U. S.*, *supra*, 15 F. (2d) 52; *Christensen v. Christensen*, *supra*, 14 F. (2d) 475; see cases on "What constitutes valid change of beneficiary" under War Risk Insurance, U. S. Government Life Insurance, and National Service Life Insurance, in 55 A. L. R. at 587, et seq., 73 A. L. R. at 327 et seq., and 81 A. L. R. at 931 et seq. In *Ambrose v. U. S.*, *supra*, 15 F. (2d) at 53, wherein the court held letters from the insured to his sister, the designated beneficiary, telling her to share the proceeds with the insured's brother and other sisters, constituted not only a valid trust, but also amounted to an effective change of beneficiary, the opinion reads:

"Should not his [the insured's] letters to his sister, Alice, the beneficiary, expressing his wish or direction for an equal division or apportionment to

both sisters and brother, in fairness to him, be accepted as the equivalent of a written request to the bureau to include them as beneficiaries? In matters of the kind under consideration the soldier's real purpose and wish should control.

"In *Claffy v. Forbes* (D. C.) 280 F. 233, Judge Neterer said that it was not vital that the bureau should receive notice of the change of beneficiary before the death of the insured, and that 'throughout the history of the civilized world, since the decrees of Julius Caesar, the intention and wish of the soldier, with relation to designation of beneficiary or disposition of property, killed in the line of duty, has been carried out when ascertained, whether it was scrawled in the sand with the point of his sword, or written on the scabbard of his sword or his shield; * * * and remedial justice requires, under the facts in this case, that the designation of the niece in the letter to the mother be established from the date of presentation to and record thereof by the Bureau of War Risk Insurance.'"

If, in this case, the Kansas Supreme Court had held the agreement constituted a valid change of beneficiary, then there could be no contention that the judgment was violative of 38 U.S.C.A. § 454a, and no federal issue would be involved. And since this is a substantial non-federal ground upon which the Kansas Supreme Court judgment might have been based, it would appear certiorari cannot issue (see cases cited under Section I, B., *supra*, of this Brief).

In any event, it is submitted 38 U. S. C. A. § 454a has no application to an agreement between *the insured* and the named beneficiary to pay the proceeds to a third person, the only requirement applicable to such agreements being that such third person satisfy the beneficiary qualifications of 38 U. S. C. A. § 511.

G.

CONCLUSION.

Petitioners' brief and petition fail to demonstrate any federal issue presented to and passed upon by the Supreme Court of Kansas. Furthermore, there is no conceivable violation of 38 U. S. C. A. § 454a by the agreement held enforceable by the Kansas Supreme Court. The federal issue Petitioners raise in this case is non-existent. Only by misconstruing the facts herein and treating the agreement as one between the designated beneficiary and a third person, rather than a contract between the *insured* and the beneficiary for the benefit of a third person, are Petitioners able to construct any controversial issue whatever, federal or non-federal.

It is submitted this Court neither can nor should issue a writ of certiorari in this case for the sole purpose of making clear to Petitioners an obvious distinction which is, and for many years has been, observed by the courts in all instances wherein agreements dealing with War Risk Insurance or United States Government Life Insurance proceeds have been litigated. Wherefore, it is respectfully submitted the petition for writ of certiorari be denied.

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